

IN RE ARBITRATION BETWEEN:

MINNESOTA PUBLIC EMPLOYEES ASSOCIATION, MNPEA

and

DAKOTA COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS Case #15-PA-0696

JEFFREY W. JACOBS

ARBITRATOR

May 18, 2016

IN RE ARBITRATION BETWEEN:

MNPEA,

and

Dakota County, Minnesota

DECISION AND AWARD OF ARBITRATOR
BMS CASE #15-PA-0696
Lawrence Hart grievance

APPEARANCES:

FOR THE UNION:

Rob Fowler, Attorney for the Union
Lawrence Hart, grievant
Sgt. Scott Fuchs, Dakota County Deputy

FOR THE COUNTY:

Susan Hansen, Attorney for the County
Captain Jim Rogers, Dakota County Deputy
Brad Jeska, Retired Jail Admin. Captain
Joe Leko, Jail Captain
Sheriff Tim Leslie, Dakota County sheriff
Corporal Tim Parker, Dakota County Deputy

PRELIMINARY STATEMENT

The hearing in the matter was held on March 1 and April 15, 2016 at the Dakota County Administration Building in Hastings, Minnesota. The parties submitted briefs to the arbitrator on April 22, 2016 at which point the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2014 through December 31, 2015. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a panel maintained by the Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues.

ISSUE PRESENTED

Was there just cause for the written reprimand issued to the grievant in this matter? If not what shall the remedy be?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE X DISCIPLINE

- 10.1 Just Cause. The Employer will discipline employees who have completed the required probationary period only for just cause. A written reprimand, suspension, demotion or discharge of an employee who has completed the required probationary period may be appealed through the grievance procedure as contained in Article VII of this Agreement subject to the limitations set forth in Article VII, section 7.7
- 10.2 Suspension and discharges will be in written form.

- 10.3 Written reprimands, to become part of an employee's personnel file, shall be read, and acknowledged by signature of the employee. Employees and the union will receive a copy of such reprimands and notices of suspension and discharge. Such information, more than 18 months old, may not be used for promotional evaluation but such information dated January 1, 1987 and after may be used for disciplinary action.

FACTUAL BACKGROUND

The record in this matter was surprisingly complex taking two full days to hear and involved, a large volume of documents consisting of statements, policies and a video of the incident itself. The parties also introduced a large number of statements taken from witnesses to the incident in question, including both deputies from Dakota County as well as inmates who were there that night.

Distilling this record down to its essential features, the record showed that the grievant is a long time employee of the Dakota County Sheriff's Department and that he is a very experienced deputy working in the jail. He has received commendations for his service in the past and gave credible testimony that he saw the need for the SRT some years ago and took steps to implement it and outfit and train the team to provide for greater safety in the jail itself. The union asserted that his record is spotless but that was not exactly the case. The record at Joint Exhibit 2 revealed that he has had some disciplinary issues in the past, although they were minor in nature; as set forth above in the County's contentions. These were also shown to be somewhat dated and on this record did not provide sufficient evidence to establish a pattern of rule violations or other employment related issues. Still though, the allegation that his entire career has been spent without incident or disciplinary warning was not shown to be the case.

The evidence showed that there are a number of policies related to the operation of the jail and that the grievant both as a Lieutenant and a long term employee was familiar with these and in fact was responsible for enforcing them in his capacity as a supervisor. There was evidence of some rules and orders that are not contained in formal policies but which were known to the grievant.

For example, the evidence also showed that as a Lieutenant and the ranking official in the jail on a routine basis, the grievant had the authority to call out the SRT if he saw the need for it in order to secure the jail or respond to an incident. On the other hand, it was clear that the grievant had been specifically directed by former Captain Jeska to notify command staff if he saw the need to call out the SRT. There were various reasons given for this including the need to notify command staff if significant overtime would be needed to call out the SRT and to the other clear order, which was to avoid surprises to command staff. The union assailed the “no surprises” testimony as not contained anywhere in policy but the testimony of Captain Jeska was convincing in this regard. Further it is generally well known in law enforcement that command staff typically wants to be apprised of anything as important as an SRT call out so they are aware of what is going on within their department; such rules are not unusual in law enforcement at all so this testimony was given great credibility. There was also evidence that SRT call outs are somewhat rare. There was no evidence that after Captain Jeska retired from the department in late May 2014 that either he or the new Captain, Captain Leko ever changed or countermanded the notification directive. Finally, there was evidence that the grievant acknowledged that in this instance he failed to give that prior notice and that command staff had no knowledge of the SRT call out until much later.

Moving to the incident itself, it was clear that there was a fight among inmates on June 8, 2014 that left one inmate badly injured. While the inmates who perpetrated the fight were removed from the unit, the grievant felt that the unit was getting out of control and determined that a shake down of the unit would be necessary to regain control and to sweep for weapons and other contraband within the unit. He determined in his discretion that the SRT would be necessary to make sure inmates complied with all directives of staff and to prevent any further incidents of violence.

There was also some evidence that even though the grievant had essentially started the SRT he had been taken off of that responsibility well prior to June 2014 and that command of the tactical portions of SRT operations had been given over to Corporal Byrd. The evidence however also showed that the grievant was not absolved of all responsibility and that he remained the ranking officer in the jail. Neither was there evidence to suggest that he was relieved of the obligations under County policy to report the use of force and the other responsibilities under other County policies, as discussed below,

The evidence showed that there were in fact two briefings that night – one was the pre-briefing as the union suggested and the other a more detailed tactical briefing regarding the call out led by Corporal Byrd to the SRT regarding what to do and when. The evidence showed that the directive to use pepper balls “if the inmates were not compliant” or words to that effect was made during that latter meeting and that the grievant may well not have heard that directive.

The video was viewed several times both at the hearing and in the analysis of the case and showed that the grievant was present on the main floor of the commons area in the unit. Sgt Fuchs is seen standing next to him as well. He can be seen ordering the inmates to exit their cells and sit at the tables in the center area of the unit. The inmates are shown being fully compliant with that directive.¹

Within seconds, perhaps as little as two seconds upon entering the area the SRT began shooting at the inmates who flung themselves on the floor and under tables and covered their heads in an effort to avoid being hit by the unexpected fusillade of pepper balls. The pepper balls were inert but the clear evidence showed that if they strike a person they can leave a painful welt and could if they hit someone in the wrong place cause considerable injury. Clearly, not only were the SRT members directed to use pepper balls inappropriately, they used them far too quickly once they appeared on the scene and without apparent justification – as the inmates were complying with the order to assemble without difficulty or apparent delay.

¹ There is no audio on the video so it is not known exactly what was said but it was amply clear from the video that the inmates were compliant with the order to exit and sit at the tables. There is no apparent recalcitrance by the inmates nor any apparent verbal push back from any of them.

The video shows that several inmates were hit by the balls but this was only plainly apparent upon a slow motion review of the video itself. It is entirely plausible that the grievant may not have known for certain if anyone had been hit but, as will be discussed later, it was clear that this was a use of force and that a great many pepper balls were fired. Further, he never checked to see if anyone had been hurt by them nor did he take the time or effort to find out why they had been deployed at all and why they had been fired without any apparent reason.

There was also no question that the grievant was surprised by the SRT's action in firing the pepper balls. His testimony and his actions on the video demonstrated that there was little he could have done at that moment to stop the action; everything happened within seconds. Within a few seconds of the pepper balls being fired though the grievant and Sgt. Fuchs are seen leaving the area.

The record showed that the grievant took no additional action that night to determine why this had happened nor did he confront Corporal Byrd to find out why the balls had been deployed or what orders had been given the SRT. While Corporal Byrd was in charge of the SRT, the grievant was in charge of the jail and had been the one who called out the SRT.

County policy requires that a prompt and thorough report be completed regarding the incident and that Corporal Byrd was responsible for filing such a report. It was undisputed that he failed to do so in this instance and that the grievant assumed he had filed his report with command staff.

Several days after the incident on June 10, 2014 another deputy reported to Captain Leko that the pepper balls had been deployed and names the 5 inmates who were struck by them. Captain Leko responded as follows: "These incidents and all use of force incidents must be reported to command staff in a timely manner. No later than the end of that shift. Not 2 days later. Please make sure that all reports are complete and video is available for our review. Thanks."

The record showed that this directive as stated in the e-mail was consistent with County Policy 300.2.1, discussed more below, and consistent with the general order that use of force incidents be promptly reported so command staff can investigate any issues and take appropriate action. Corporal Byrd had also responded to this e-mail chain and acknowledged that it was his “fault” and that he was past the 16 hours and forgot to send the notice to command staff about the pepper ball incident. See, County Exhibit 22.

As noted above, on June 13, 2014 the grievant responded to that e-mail chain with the comments: “I also asked why she [Deputy Winfrey] was reporting this and not the supervisor that was on duty.” The simple conclusion is that the grievant was the supervisor on duty, not Corporal Byrd. While Corporal Byrd was in charge of the SRT, the grievant was in charge of the jail. There was no evidence that not being in charge of the tactical operations of the SRT somehow absolved the grievant of his other supervisory duties.

The County command staff commenced an investigation and interviewed several deputies and even some inmates regarding the events of that evening. As will be discussed a bit more below, the investigation was hardly perfect but was thorough enough to demonstrate what happened. There were discrepancies in the stories, especially with regard to what briefings the grievant was present for and what he heard about the order to deploy pepper balls.

On balance, the grievant's story about what he knew about the briefings was credible and plausible in that he attended one meeting but not the one where the directive to deploy the pepper balls was given. Whether this absence was a help or a hindrance to his case however was a matter of some contention between the parties. The union argued that his lack of knowledge absolved him from responsibility for the directive. The County argued that he was still in charge and even if Corporal Byrd was in charge of the SRT, the grievant still had overall responsibility to at least listen to what was being told to the SRT to make sure it complied with policy and with his desired outcome – since he called for the SRT in the first place.

Based on the investigation and the statements by the relevant parties to the incident, the county imposed oral reprimands on two of the SRT deputies who had deployed the pepper balls in violation of policy. The County asserted that while these were the individuals who actually fired the shots, they were essentially told to do so by supervisors. They were in effect following orders even though it was apparent the deployment of the pepper balls came very early in the incident.

Corporal Byrd was also given a written reprimand for his actions in this matter. The record revealed that the union initially grieved that action but later dropped that grievance and the written reprimand remains on Corporal Byrd's record². Two other deputies on the SRT were issued oral reprimands but the parties' grievance procedure does not allow for grievances over oral reprimands. See Section 10.1 set forth above, which provides as follows: "A written reprimand, suspension, demotion or discharge of an employee who has completed the required probationary period may be appealed through the grievance procedure ..." There was thus no evidence of any grievances filed over the oral reprimands given to the deputies on the SRT who fired the shots.

The County issued the grievant a written reprimand and outlined a number of policy provisions he allegedly violated. Through the grievance process though several of these were dropped but the written reprimand remained. The grievant continues to challenge the written reprimand he received and the matter proceeded to arbitration. It is against that factual backdrop that the matter proceeds.

PARTIES POSITIONS

COUNTY'S POSITION:

The County's position was that there was no violation of the agreement in this matter and that there was just cause for the discipline issued to the grievant. In support of this position, the County made the following contentions:

² Corporal Byrd did not appear at this hearing even though his statement given to investigators was admitted into evidence.

1. The County asserted that the grievant was the ranking officer in charge of the Dakota County Jail facility on the evening of June 10, 2014. As such he was under standing orders to notify his superiors officers of the decision to call out the Special Response Team, SRT, and to make sure the SRT followed protocols and procedures in the use of force. He was also aware of the requirement to stay at the facility and report the use of force to command staff. The County asserted that this was necessary to assure that all personnel and inmates were safe or whether they were injured and to assure that all proper procedures were followed. The County asserted that actual injury or physical harm is not required to trigger a supervisor's responsibility under the use of force policy. See, County Policy 4.6.5.0E (1) and 4.6.4.0.B.

2. The County's case rested in large part on the assertion that the grievant failed to notify his captain of the call-out of the SRT, failed to make sure the SRT was properly instructed and to remain on site after there was a use of force that evening. Instead he left critical decisions in the hands of a corporal who also failed to follow procedures regarding reporting of the use of force.

3. The County noted that it was undisputed that the grievant called for a shake down of a unit within the jail due to a fight that had occurred a few days earlier and of the need to regain control of the unit and to ascertain if weapons or contraband was in the unit.

4. The County asserted that the grievant knew that under former Captain Jeska, it was required to notify command staff that he was going to call out the SRT. He failed to do that in this instance and while he should also have notified Captain Leko of the incident, it was undisputed that he did not. The County asserted that for this reason alone a reprimand was warranted.

5. The County also noted that when the SRT team arrived the plan was to have them assemble to discuss tactics and the logistics of the shake down. The County asserted that he did not assert in his statement given to investigators after the incident that evening that he was not there, thus the County urged the conclusion that he was present and heard the briefing that night.

6. The County noted too that at least one other member of the SRT clearly indicated in his statement that the grievant was present for the briefing. That deputy also noted that he heard the directive to deploy pepper balls if the inmates did not comply. The grievant should have stopped the briefing at that point and clarified that the use of pepper balls needed to be in compliance with County policy yet he did not.

7. The County noted that the use of pepper balls is a use of force that the grievant should have been aware of. The fact that he now claims that he was unaware of it also demonstrates a lack of responsibility on his part and an unwarranted abdication of his responsibility as the ranking officer in charge that night to a corporal. While the corporal had been trained in the SRT team and was in command of it, the grievant was in command of the jail.

8. The County also noted that the grievant called the inmates into the commons area but that within seconds, the SRT team burst onto the scene and even though the inmates were compliant and cooperative, the SRT members began shooting them with pepper balls. The grievant can be seen in the video witnessing the deployment of the pepper balls but then simply walking away instead of determining whether any one had been hit or hurt by the pepper balls. The County argued that this was a clear violation of policy and yet another unwarranted abdication of his command responsibility.

9. The claim that he did not know that anyone had been hit was, in the County's view, an unreasonable assumption and irresponsible to then leave even though he had witnessed the event and the inappropriate use of the pepper balls. The grievant did not notify command staff of this incident and instead left that task to Corporal Byrd. He then attempted to lay blame on the corporal for failing to promptly report the incident when the corporal failed to do so in a timely fashion.

10. The County asserted that as a Lieutenant in charge of the jail it was the grievant's responsibility to make sure this incident was properly investigated and reported but he walked away from it and let subordinates not only take the responsibility for it but asserted that the bore all responsibility for any disciplinary consequences for it.

11. The County argued that the grievant's conduct violated several County policies, of which he was aware. Policy 300.2.I Duty to Intercede provides as follows:

Any deputy present and observing another deputy using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. A deputy who observes another employee use force that exceeds the degree of force permitted by law should promptly report these observations to a supervisor.

12. The County asserted that once the grievant witnessed the incident and clear deployment of pepper balls, it did not matter that he thought no one had been hit – it was a clear use of force that exceeded the degree of force permitted by law and that under the policy set forth above, he had a responsibility to “promptly report these observations to a supervisor.” The County countered the claim by the union that Sgt. Fuchs was not disciplined even though he was there because Sgt. Fuchs can be seen standing directly next to the grievant – who was his Lieutenant. Reporting it to the grievant at that point would have been absurd as they both saw the same thing at the same time.

13. Further, County Policy 300.7 outlines at least eight separate responsibilities of a supervisor and requires that a supervisor obtain the basic facts. He failed to do that – he simply walked away and left the corporal to do that. A supervisor must also “ensure that any injured parties are examined and treated.”

14. The grievant failed to do that because he assumed without checking that no one had been hit. In fact, several inmates had been hit causing injuries to their skin. The grievant did not perform his duties because he assumed unreasonably that he did not have to. A supervisor must also review medical reports, record interviews and identify any witnesses not already included in the reports. The County noted that the grievant did none of this. A supervisor must also determine if there may be litigation. He failed to check on that even though some inmates had been hit – inmates who were apparently cooperative and compliant with the directive to assemble in the common area.

15. The County argued that the grievant as a long time supervisor in the jail knew of these policies, knew of the responsibility he had as a supervisor, County Policy 340.3.5, and the ranking officer in the jail that evening and of the clear requirement to notify command staff both before and after the SRT call out in this instance, especially given the use of force deployed that night yet he failed to follow through on those responsibilities.

16. The County asserted that the grievant violated policy #'s 33.2.1 – Use of Force Duty to Intercede; 300.7 – Use of Force Supervisory Responsibility; 340.3.5 – Conduct; 340.3.8 – Conduct; and 4.6.3 – Procedural Guidelines. The grievant was aware of these policies and of his responsibility under each of these.

17. The County asserted that the investigation was both thorough and fair and showed that the grievant violated several County policies with respect to the events of June 10, 2014.

18. Further, the County argued that the written reprimand was reasonable and appropriate. The County pointed out that the initial reprimand cited several other policies which it later deleted through the grievance process – such #300.3 – Use of Force and 8.4.0.0 – Use of Force, because it was determined upon investigation that these did not apply. The County asserted though that the others clearly did and that a written reprimand was warranted in this instance. The County further noted that the grievant, while an excellent officer has had discipline in the past for insubordination, failure to attend mandatory training and failure to complete required training.

19. Finally, the County noted that the corporal involved was also issued a written reprimand for his actions that night and several members of the SRT were issued oral warnings even though they fired the shots. Those lower level deputies received lesser forms of discipline because they were in fact following the directives of the corporal/ commander of the SRT team. Some SRT deputies even indicated that they thought the directive to deploy the pepper balls came from the grievant himself.

20. The essence of the County's case is that the grievant knew of his responsibility yet failed to perform his duties by failing to notify his captain either before or immediately after the call out as outlined above and then placed blame on a lower ranking deputy when it is well established that supervisors are held to a higher standard of conduct and responsibility. The County argued that the use of pepper balls was inappropriate and the grievant failed in his responsibilities on several levels.

The County seeks an award of the arbitrator denying the grievance in its entirety.

UNION'S POSITION

The union's position was that there was no just cause for the discipline issued to the grievant in this case. In support of this position, the union made the following contentions:

1. The union asserted that the grievant is an experienced and decorated deputy who has been unjustly blamed for the failures of subordinates. The union argued that the grievant has the authority to call out the SRT but was specifically told that Corporal Byrd was in charge of it. The grievant was even taken off the SRT years ago and directed to let the corporal handle SRT activities.

2. The union cited numerous legal and arbitral cases of the proposition that the County has a high burden of proof to meet and asserted that under the well-established principles of just cause, the County's case fails for lack of proof and evidentiary support.

3. The union further asserted that the grievant was well within his authority as the ranking officer in the jail to call out the SRT team and to call for the shake down of the unit given the fight and other activities that had gone on only days before June 10, 2014. However, the union asserted that the use of pepper balls was incorrectly directed by Corporal Byrd and that the grievant had no knowledge of that nor was he required to intervene in the briefing held immediately prior to the shake down.

4. The union acknowledged that the use of pepper balls that evening was inappropriate but blamed Corporal Byrd for this as well as several members of the SRT team. The grievant had no direct authority over those individuals nor did he have any knowledge that they had been directed to use the pepper balls. Neither did he direct the use of the pepper balls that evening.

5. The union asserted that there were in fact two briefings that evening, not one as the County suggested, and that the grievant was not involved in both of them. The first was a supervisory pre-briefing in which the grievant did participate but there was no discussion whatsoever regarding the use of pepper balls at that meeting. He then left that meeting and was not involved in the more detailed tactical briefing, run by Corporal Byrd, later. The grievant had no knowledge of the directive regarding pepper balls and, more significantly, no responsibility to interfere with the tactical briefing since he had been directed by command staff to leave the tactical decisions to Corporal Byrd.

6. The union also maintained that the grievant had been specifically ordered by Captain Jeska to leave all tactical decisions in the hands of Corporal Byrd. He was doing exactly as he had been ordered that evening and indeed left those decisions on tactics and use of force to the commander of the SRT – Corporal Byrd. The union argued that the grievant should not be punished for doing as he had been told to do by a superior officer. The union noted that the grievant's testimony regarding the direct order he had been given was unrefuted by the County and must be accepted as truth.

7. The union also asserted that some of the deputies who claimed they saw the grievant at the briefing where the directive regarding pepper balls was given were simply wrong. Instead, the union suggested that they saw the grievant at the other briefing and were conflating the two meetings.

8. The union acknowledged that the grievant was present during the incident and in fact was the person who called the inmates out into the common areas, as can be seen on the video of the incident. The union argued that he had absolutely no idea that the SRT team was directed to use pepper balls nor was he in a position to stop them once they did. The grievant was at a desk on the main floor when the SRT entered the room from the catwalks on the second floor. There were perhaps two or three seconds between the time the SRT entered and when the first pepper balls were fired.

9. The union and the grievant maintained adamantly that he did not know that any of the inmates had been hit and saw only that the balls hit the ground or table tops once inmates began diving on the floor. He had no knowledge until much later that any inmates had been hit.

10. Further, the union argued that the grievant then exited the room and again left further tactical decision to Corporal Byrd to get the inmates out of the area and search the cells for contraband etc. The union argued that this was consistent with the prior directive to leave the SRT to Corporal Byrd and not interfere with his supervision of it.

11. The grievant and union also asserted that it was Corporal Byrd's responsibility to determine if inmates had been hit and then to take appropriate action and provide documentation if they had.

12. When the grievant discovered that Corporal Byrd had failed to file a report as he was required to the grievant expressed as much surprise as the command staff had. The grievant even commented in an e-mail that Corporal Byrd should have done his job and reported the use of force immediately because he reasonably assumed that Byrd had done his job and filed the reports promptly. The union asserted though that the grievant did not have the obligation to report the use of force since Corporal Byrd was in charge of the SRT.

13. The union also assailed the investigation as incomplete and biased. Sgt. Fuchs was not even interviewed even though he was clearly standing right next to the grievant. He was further not disciplined even though he too was a supervisor in the jail. Corporal Byrd was interviewed but never asked about the grievant's involvement in the briefing the County relied on so heavily for its case. The union also argued that the investigator failed to ask pertinent questions or follow up when it was clear that some witnesses were confused about times and locations and who said what when. The union asserted that these errors and omissions in factual background for the County's actions presented a fatal flaw in their conclusions.

14. Moreover, the County never called either Corporal Byrd or Deputy Themmes as witnesses, both of whom could have clarified whether the grievant was even at the tactical briefing. Instead the County relied on their statements, that the union contended were hearsay, and therefore unreliable, and that they were inconsistent internally.

15. The union asserted that without adequate evidence the County's case must be rejected due to lack of credible evidence or testimony from witnesses they could have called but did not.

16. The union argued further that the policies on which the County relied do not apply to sustain discipline against the grievant in this situation. The union first noted that several of them were shown not to apply at all during the grievance process prior to arbitration and were withdrawn as bases for the discipline. The union argued that this "shotgun" approach demonstrates the lack of care the County used to determine the foundation for discipline and the weakness of its case.

17. Further, those remaining policies left in the formal disciplinary letter of November 14, 2014 should be rejected as well. Policy 300.2.1 Use of Force, Duty to Intercede relates to an alleged failure to stop the excessive use of force. However, the video clearly shows that the time between the SRT's entry and the pepper balls shot was less than 2 seconds. The grievant could not have stopped that especially in light of where he was located during the incident.

18. Further, the County conceded on cross examination that the basis for this allegation related to the question of whether the grievant knew about the instructions given to the SRT and not about his failure to intercede during the incident itself. If the grievant did not know about the instruction and was not there for the tactical briefing this portion of the discipline cannot be sustained.

19. The union next turned to policies Policy 300.7 Use of Force, Supervisor Responsibility; and Policy 340.3.5 Conduct and asserted that these did not apply either. Both of these policies pertain to the allegation of either giving incorrect instructions to the SRT or failing to correct the wrong instructions. As noted above, the grievant was not present for those instructions and did not know of them at all. Thus, these policies do not apply per their own terms.

20. Finally, the union asserted that policy 340.3.8, Conduct does not apply either since it also pertains to “known misconduct” or “knowingly permit members of their commands to violate any law official policy or procedure” or “failure to take appropriate action.” The union maintained that the grievant did not know of the instructions given to the SRT and could not therefore have taken action to prevent what happened. Without knowledge, the grievant could not have violated these policies and the County never proved that he had any knowledge of the directive to use pepper balls that night. See also, 4.6.3.0, Procedural Guidelines. The union argued that those guidelines are equally inapplicable.

21. At best the County presented the written statement of only one witness who “thought” the grievant was present for one of the briefings and could not say if he heard definitively that the grievant gave the directive or that the grievant was physically present for the directive to deploy pepper balls by Corporal Byrd. Without these essential facts, the County’s assertions with respect to a huge portion of the case against the grievant must fail for lack of evidence and proof.

22. The union disputed the vicarious liability theory advanced by the County that placed responsibility on the grievant merely because he was there. The union argued that just cause requires a showing that an employee intentionally or negligently violated a rule or policy. The grievant had no knowledge of the directive to deploy pepper balls and no opportunity to stop the SRT from shooting them once they burst onto the scene. It was for Corporal Byrd to take charge of the SRT and report the incident to command staff. The grievant did nothing wrong and should be exonerated.

23. The union also took issue with the claimed “no surprises” policy and indicated that there was no documentation to support this policy. The grievant was authorized to call out the SRT and had no knowledge that he would be held to a “higher standard” of conduct based on unwritten policies. The union argued that there is no generally accepted rule holding supervisory staff to a higher standard of conduct under a just cause analysis – either the grievant violated a policy that was known and fairly applied and investigated or he didn’t. If he did not, then no discipline should result.

24. The union went through the “7 tests of discipline” used by a great many arbitrators and commentators and asserted that a “no” answer to those questions demonstrates a lack of proof of just cause. The union cited several arbitral commentators and the seminal cases by Arbitrator Daugherty in *Grief Bros. Cooperage*, 42 LA 555 (1964) and *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966).

25. There was inadequate notice as discussed above – unwritten rules conflicted with written policy directives. There was no proof of any rule violation – the grievant broke no rules at all. Further, the investigation was fatally flawed and lacked specificity from material witnesses – as well as failure to interview several material witnesses, and fails the test. There was also disparate treatment in that Sgt Fuchs was clearly present yet he was not disciplined or even interviewed. The degree of discipline was also out of proportion to any offense in that the actual shooters were given only oral reprimands. The grievant's involvement in this case is so tenuous that no discipline should ensue.

Accordingly, the union seeks an award sustaining the grievance, expunging the discipline meted out in this instance and making the grievant in all ways.

DISCUSSION

REVIEW OF THE POLICIES ALLEGEDLY VIOLATED

POLICY 300.2.1.

The parties spent considerable time going over the various policies the grievant was alleged to have violated. As noted above, the original reprimand issued to the grievant had several policy violations that were later withdrawn as a basis for the discipline even though the reprimand itself was not altered. It will now be necessary to review the remaining policies set forth in the reprimand to determine which of them were violated based on the record presented, if any.

First, as noted above, the evidence showed that the grievant had been directed to notify command staff if he intended to call out the SRT for any reason. There were a variety of underlying reasons for this directive but it was clear that command staff, Captain Jeska in particular wanted to be informed if the SRT was to be called out. There was also evidence that the Sheriff did not like “surprises” and wanted to be informed of decisions where possible. Clearly these directives were known to the grievant who acknowledged that he failed to notify Captain Leko of the SRT call out. Even though there was no formal written policy these were orders he was expected to follow.

Further, Captain Leko was new to jail administration but there was no evidence that he changed Captain Jeska’s orders. Thus the County showed that the grievant violated these directives.

Second, turning to some of the specific policies themselves reveals a mixed bag with some policies shown to have been violated and others not.³ Policy 33.2.1 – DUTY TO INTERCEDE was cited by the County as the basis for the discipline. That policy provides as follows:

Any deputy present and observing another deputy using force that is clearly beyond that which is objectively reasonable under the circumstances shall, when in a position to do so, intercede to prevent the use of unreasonable force. A deputy who observes another employee use force that exceeds the degree of force permitted by law should promptly report these observations to a supervisor.

Here, the facts showed that while the grievant was likely not in a position to intercede to prevent the firing of the pepper balls since it happened so quickly and due to his likely lack of knowledge that they had been directed to use them, the second part of the policy does apply to the grievant’s actions here.⁴ He should have reported this to command staff instead of assuming Corporal Byrd would.

³ I will not dwell on the policies that were removed or stricken from the written reprimand as there was no dispute that on these facts they were not violated. Further, they no longer form the basis of the discipline such that no further time or analysis is necessary or warranted to discuss them at this point.

⁴ The reprimand asserted in relation to the alleged violation of Policy 300.2.1. that one must give subjects a sufficient amount of time to comply with directions given. This allegation was not shown to be the grievant's fault on this record. The record as a whole showed that he did not give the order to deploy pepper balls and that the SRT simply fired them far too quickly. The grievant was not in a position to stop that given his lack of apparent knowledge in advance that they were going to do it and his physical location. One could argue that that he could have ordered them to stop shooting once he saw what was happening, but the time frames here made that somewhat speculative. Further, based on the other findings in this matter it was not necessary to dive into the speculative discussion of what he might have done in that particular situation. As discussed above, the grievant's actions in failing to report this were shown to be a violation of the policy on this record.

The video and other testimony showed that the use of the pepper balls was clearly in excess of the force necessary under the circumstances and should have immediately been reported. Moreover, the grievant failed to promptly report the use of force as the policy requires. Instead, he apparently assumed that Corporal Byrd would do it. On this record it was shown that the grievant's actions in leaving the area, not interceding or undertaking any investigation at all that night as to what happened and why was a violation of this and other policies. More to the point, his failure to promptly report it to command staff that evening or even the following day was a violation. Thus, while the first part of Policy 300.2.1. was not violated on these facts the second portion of it was.

POLICY 300.7

This policy was somewhat lengthy and outlines a supervisor's responsibility with regard to a number of matters that occur within a supervisor's purview. One matter that the union addressed initially is whether a supervisor is held to a higher standard. The union asserted that just cause requires the same sort of analysis for a line employee than it does for a supervisor and that there is nothing in the just cause standard that holds superiors to a higher standard.

Under the terms of these policies that is only partially true. While the analysis required under just cause does not change in that there are a set of tests, whether one uses all seven of them or not, that are generally followed in determining whether just cause exists. Thus while the standard of proof of these tests is the same, the standard of conduct required of a supervisor is frankly higher because they are supervisors. Moreover, the policies themselves place additional responsibilities specifically on supervisory personnel that are not placed on lower ranking employees.

Further, it is well established that a supervisor, especially one in a paramilitary operation like a sheriff's department do have greater responsibilities than those under their command both for enforcing policies and to set examples of conduct that line employees must follow. Thus, while the standard of *proof* may be the same, the standards of *conduct* required may not be. The inquiry now turns to the requirements of the actual policy itself.

Policy 300.7 deals with use of force incidents and lays out a number of specific requirements when such incidents occur.⁵ Under this policy, the supervisor is expected to obtain basic facts, ensure that any injured parties are examined and treated, separately obtain recorded interviews, where possible, get photos of the scene or persons injured, identify witnesses, review any applicable reports, determine if there may be litigation in response to the incident and evaluate the circumstances surrounding the incident. The policy concludes with the statement that “in the event a supervisor is unable to respond to the scene of an incident involving the reported application of force the supervisor is still expected to complete as many of the above items as circumstances permit.” Nowhere in the policy or on this record was there evidence that the fact that Corporal Byrd was placed in charge of the SRT resulted in the grievant not being required to perform these tasks. Further, there was nothing on the record, even if Corporal Byrd was in charge of the SRT, that abdicated these responsibilities from that of the Lieutenant in charge of the jail.

Having said that the County's reprimand focused on the directions given to subordinates and the need to clarify those directions to assure they comply with applicable policies. The County focused on the allegations that the grievant gave the direction to “get people moving” and “get their [the inmates'] attention. The County asserted in its disciplinary letter dated 11-14-14, that the grievant's directions were not consistent with County's use of force policy.

⁵ The actual policy is contained in employer Exhibit 2 and will be paraphrased here. As noted, not all these separate provisions applied to this particular incident but the policy is quite specific and places a degree of responsibility on a supervisor, like the grievant, that were not followed in this instance.

This assumes that the grievant gave those directions and the record on that was unclear at best. One deputy who was interviewed thought those directions came from both the grievant and Corporal Byrd but his statement was less than completely clear on that score. This allegation was thus a bit more tenuous in that the County appeared in its disciplinary letter to assume that the grievant gave the order to use the pepper balls but the record did not support that.

Still though, the troubling part of the grievant's actions was that after it was clear that pepper balls were fired he took no further action and left. He never determined if inmates had been hit or not, even though a number of pepper balls had been fired, nor did he take steps necessary to make sure that there were reports filed. The union argued that the fact that Corporal Byrd was in charge of the SRT and the grievant was told “not to interfere with it” relieved the grievant from any of the other requirements of supervisor in a situation like this. On this record it did not. Not interfering with the tactical operations did not on this record equate with letting go of any and all supervisory responsibility. On this record, there was a basis for the County’s claim of a violation of this policy.

POLICY 340.3.5

This too contains a laundry list of responsibilities and prohibitions governing conduct of employees covering a wide range of activity – many of which did not apply here at all. The one the County focused on appeared to relate to “knowing or negligent violation of the provisions of the Office Manual, operating procedures or other written directives of an authorized supervisor.” The reprimand stated that “this particular policy concerns your direction to staff to violate a policy, directive or procedure. You clearly violated this policy with your actions during this incident.” On this record, there was insufficient evidence to support this allegation and it should be deleted from the grounds for this discipline.

As noted herein, the record did not establish that the grievant either gave the order, despite the statement from one witness who thought perhaps he had. His statement was reviewed and showed a lack of clarity in this regard and the record thus fell short of the preponderance of evidence necessary to firmly establish that the grievant gave the order or that he was there and aware that it had been given and took no action to countermand it. The record was insufficient to establish that the grievant either directly gave the order to deploy the pepper balls nor that he was clearly present for that order and either ignored it or condoned it.

POLICY 340.3.8

This policy also requires knowledge and provides that a supervisor “shall not knowingly permit members of their command to violate any law or official policy or procedure.” As noted above, this portion of that particular policy was not established in that the record as a whole showed that the grievant was not aware of the order or that the SRT was going to deploy the balls at all much less that they would deploy them as quickly as they did.

However, having said that, there is another part of that particular policy that does apply in this instance. Section 340.3 (b) provides that “supervisors and managers are required to follow all policies and procedures and may be subject to discipline for: ... (b) failure of a supervisor to report in a timely manner any known misconduct of an employee to his/her immediate supervisor or to document such misconduct appropriately as required by policy.” Section (a) of that same section also requires that the supervisor take appropriate action to assure that employees adhere to the policies and procedures of th[e] office...”

The failure to report this incident at all was also troubling in that the grievant appeared to defer entirely to Corporal Byrd to do everything once the incident occurred. The County made a persuasive argument that even if Corporal Byrd is in charge of the SRT, the grievant is still in charge of the jail and had the obligation and responsibility to report this and to take actions as noted herein, to find what how and why this happened and more importantly to take steps to prevent it from happening again.

The County also referenced the failure to report in the reprimand letter as well stating that the grievant “was responsible for notifying command regarding the use of force.” Thus, the County showed that this portion of that particular policy was violated.

POLICY 4.6.3

The crux of this policy as it pertains to this case is found in Section 4.6.3 (B)(3), which provides that “the Correction Supervisor on duty is responsible for: ... Informing the Jail Administrator of the emergency, and calling out the Special Response Team members.” As noted above, there was no dispute that the grievant failed to contact Captain Leko to inform him of the SRT call out. The union argued that the grievant had the discretion to call out the SRT if he felt it was necessary. On that point there was no dispute either: the grievant does have that authority but as part of that he also had the responsibility to inform command staff of that decision. On this record this policy was also clearly violated.

THE DISCIPLINARY TESTS

As part of any just cause analysis, there are a number of determinations that must be made to determine if just cause exists in support of employee discipline. Whether one accepts that there are really 7 of them or a smaller number, there is general agreement that notice, a showing that the rule allegedly violated was reasonable and reasonably applied, that there was a fair and unbiased investigation, that there was adequate and persuasive evidence of the allegations of the rule violation (i.e. was the grievant guilty as charged by some measure of proof), that there was no disparate treatment of the employee and that the level of discipline was appropriate given the proven offense.

The essential facts on this record are that even though Corporal Byrd was in charge of the tactical aspects of the SRT the grievant was not relieved of his duty to be in charge of the jail nor of the responsibility to assure that those under his command followed orders and applicable County policies.

While a supervisor cannot be everywhere all the time and it was shown that the grievant may well not have been present for the tactical briefing, as noted above, these facts did not absolve the grievant entirely on this record. He called out the SRT and should have been at least present for the tactical briefing. Further, even though he clearly saw the pepper balls deployed he simply left the area and relied on a subordinate to follow up with any additional tasks that needed to be completed. The mere fact, as the union noted, that if Corporal Byrd had done his job, none of this would have occurred is not only not controlling, it demonstrates the very point the County is making here – that it is a supervisor's job to make sure things get done properly even though some tasks are delegable to others.

The question now is whether based on the tests of just cause there were grounds for discipline and the degree of discipline that was issued.

NOTICE

The union argued that there was inadequate notice to the grievant. The basis for this is the claim that certain directives and operational practices conflict with policy and that policies were in a state of transition and not clear on their face. The union also asserted that the County failed to prove that the policies were in harmony with the express directive of Captain Jeska in giving over command of the SRT to Corporal Byrd.

These allegations did not find adequate support in the record. More to the point, it was clear that the directive to inform command staff of the SRT call out was well known and understood. The grievant admitted that he failed to do this.

Moreover, the policies, while under review, were in place and understood well enough that the claim of inadequate notice of the responsibility to report and take appropriate action once there was such a clear violation of policy was without sufficient evidentiary support.

REASONABLE RULE

The union further argued that the rules allegedly violated were not reasonable as applied to the grievant although it was not completely clear what the basis of this was. The assertion is that the County's claim assumes that notification is required prior to the use of force. This argument misses the point. The problem here was manifold in that the grievant failed to notify command staff either before or after the call out or after the clear use of force and then left without taking any further appropriate action to find out what did happen here or to take the steps as required by the policies set forth above.

The rules and policies at play in this case were shown to be eminently reasonable and were applied in a reasonable manner.

INVESTIGATION

The union raised a number of issues here. The initial issue was that not all material witnesses and persons involved were interviewed. Primarily, this allegation was based on the fact that Sgt. Fuchs, who was clearly there for the incident, was not interviewed. On this record that failure was not controlling and did not render the investigation invalid. Other witnesses indicated that he was only tangentially involved with this whole affair and had little if anything to do with the call out or the subsequent actions taken that night.

The union asserted that the investigation was poorly done, showed that investigators did not follow up with pertinent questions and left many questions unanswered that should have and could have been answered. As noted above, the investigation was not perfect and several of the witnesses to the briefing gave unclear answers about the exact presence of the grievant during these briefings.

On this record, this proved to be harmless error since the overall record showed that the grievant likely was not present for the directives given by Corporal Byrd regarding the pepper balls. Thus, any lack of clarity or demonstrable inconsistency in the statements did not impact the outcome of the case in that regard. As noted above several of the grounds were shown to have been without adequate support apart from an inconsistency in the statements anyway.

Further, there was no showing of any evident bias against the grievant or that the investigation was a sham of sorts done to justify a pre-ordained result. Thus, on this record the investigation was adequate and did not prove fatal to the County's case.

PROOF OF RULE VIOLATIONS

The union asserted that there was inadequate proof of the alleged violations and that without thus the entire case must be thrown out. This as largely based on the lack of knowledge of the directives during the SRT briefing. On this record, as discussed in some detail above, that was not the sum total of the County's case. The lack of knowledge was but one part of the case and not all of it. There was substantial proof of many of the allegations regarding failure of notice to command staff and lack of follow up with other requirements.

DISPARATE TREATMENT

This allegation by the union was based on large part on the reprimands that were given to other personnel that the union claimed were far more responsible for the failures in policy that night than the grievant. There were only oral reprimands given to the actual shooters and a written reprimand given to Corporal Byrd, who really was in charge of the SRT and who really did give the command to deploy the pepper balls and who likely did instruct the SRT to use them almost immediately.

Further Sgt. Fuchs, also a supervisor was not given any discipline at all even though he was there, and allegedly should have reported the incident to a supervisor.

The trouble with the last argument is as the County asserted above – Sgt. Fuchs was standing next to the grievant - his lieutenant - when this all happened. He had virtually no other involvement in this matter. The rhetorical question would of course be – to whom would he have reported it? Answer: the grievant – who was of course his direct supervisor and who was standing shoulder to shoulder with him.

Moreover, the County gave credible and persuasive evidence as to why Corporal Byrd was given a written reprimand and why the other SRT members were given only oral reprimands. The latter two were directed to fire the pepper balls and were placed in a difficult situation of following orders or perhaps disobeying those orders from supervisor ranking deputies.

On this record, there as insufficient evidence of disparate treatment. The County provided adequate explanations for why the grievant, a supervisor, was given a written reprimand. It should be noted, as was touched on above as well, that the grievant was not disciplined merely because he was there but rather because of his actions and failures that night as discussed at length here and as presented by the County over the course of several hours of testimony and hundreds of documents.

DEGREE OF PENALTY

The union finally assailed the penalty claiming that it was out of proportion to any proven offense – even if one was found - and that a written reprimand for the grievant was simply to harsh.

The union also asserted that the grievant had a spotless record. As Joint Exhibit 2 shows, while it is a very good record and while the grievant has been commended and even decorated in the past his record is not completely spotless. To be sure the grievant's discipline is now quite dated and was given only limited evidentiary weight. The question is thus whether a written reprimand was so unreasonable to warrant a reduction of that penalty through arbitration.

The County asserted that arbitrators should not disturb a penalty unless there is a showing that it was arbitrary or capricious. See, *Great Atlantic and Pacific Tea Co., Inc.*, 71-2 ARB 8564; *Stockham Pipe Fitting Co.*, 1 LA 160 (McCoy 1945). See also, *Allied Healthcare Products and International Assoc. of Machinists and Aerospace Workers, District 2*, 120 LA 890 (2004) (Fitzsimmons). The County argued that unless there is a compelling showing of the need to modify or reduce the penalty, once an employer has proven its case, so to speak, the arbitrator must not disturb the penalty.

This is too narrow a view of the discretion granted arbitrator under a just cause analysis. The County would have all arbitrators simply defer to its judgment regarding the penalty to be meted out in response to a given proven rule infraction or violation, that is too simplistic and wooden an analysis. Arbitrators are expected to review the penalty as part of just cause to determine if the “punishment fits the crime.”

As Elkouri and many other commentators have noted, the length of employment and prior record is an essential part of that analysis. See, Elkouri and Elkouri, *How arbitration Works*, 6th Ed BNA Books at pages 958-962. Elkouri notes that “where the agreement fails to deal with the matter, the right of the arbitrator to change or modify penalties found to be improper or too severe may be deemed to be inherent in the arbitrator’s power to decide the sufficiency of cause.” *Id* at page 958.

See also, *The Common Law of the Workplace*, Section 10.23 where Professor St., Antoine notes as follows:

“In the absence of a contractually specified penalty or clear limitation on arbitral discretion, both arbitrators and courts agree that the arbitrator may reduce the penalty imposed by management. Most arbitrators will change a penalty if, given the facts of the case, including the grievant’s seniority and work record, it is clearly out of line with generally accepted standards of discipline.”

Elkouri also discusses the difference between leniency and mitigation of the penalty, *Id*, at pages 963-964. There is further a lengthy discussion of the factors to be used in determining whether to mitigate a penalty or not. Length of employment and prior record are factors to be considered. *Id*. at 983-990.

Here though, there was adequate evidence to support a written reprimand. The grievant clearly violated several directives and did not follow through on his supervisory responsibilities. As noted several times here, the fact that Corporal Byrd was in charge of the SRT did not mean that the grievant was no longer responsible for what happened in the jail nor was he absolved from his other responsibilities under applicable County policies and directives from superior officers.

Finally, as discussed above there is a somewhat higher expectation of supervisory staff to comply with policies without undue repetition of points already made, the record here showed that the process used to determine just cause by the County was adequate and that the penalty meted out in this particular instance and on this unique record, was not so unreasonable as to warrant a modification of it through arbitration.

Accordingly, the grievance is thus sustained in part and denied in part. The written reprimand will remain in place but as noted above, references to Policy 340.3.5 and that portion of 340.3.8 as discussed above are to be removed.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The written reprimand will remain in place but the County is directed to delete references to Policy 340.3.5 and that portion of Policy 340.3.8 discussed above as bases for the discipline herein, as set forth above.

Dated: May 18, 2016

MNPEA and Dakota County Award Hart 2016

Jeffrey W. Jacobs, arbitrator